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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re CHARLIZE H. et al., Persons Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. KERIANN Q., Defendant and Appellant.	G057415 (Super. Ct. Nos. 17DP1333 & 17DP1334) O P I N I O N

Appeal from orders of the Superior Court of Orange County, Gary L. Moorhead, Judge. Affirmed.

Rosemary Bishop, under appointment by the Court of Appeal, for Defendant and Appellant Joshua H.

William D. Caldwell, under appointment by the Court of Appeal, for Defendant and Appellant Keriann Q.

Leon J. Page, County Counsel, Karen L. Christensen and Jeannie Su, Deputies County Counsel, for Plaintiff and Respondent.

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In December 2016, Keriann Q. (Mother) was residing with her four-year old daughter Charlize in a motel in Long Beach. Mother's other daughter, Katelyn, then eight years old, was living with her paternal grandparents in Riverside, Katelyn's biological father having died in 2007 of a drug overdose.

On December 28, 2016, social workers received a call about possible neglect of Charlize by "two unsteady drug parents." Three days before, a row between Mother and Charlize's father Jeremy (Father) had led to police being called out. Mother and Father had a long history of domestic violence accumulated over the previous two years. Social workers investigated, and detained the children: Charlize was placed with her paternal uncle and his girlfriend (later her aunt) in Huntington Beach; Katelyn continued with her paternal grandparents in Riverside.

In mid-January 2017, social workers filed a petition to declare both Charlize and Katelyn dependents of the juvenile court based on the history of domestic violence between Mother and Father. The court ordered visits from either parent to be monitored. It prescribed a case plan that envisaged anger management, counseling to address domestic violence, and on demand, drug and alcohol testing on "suspicion." If any test was "missed or dirty," then the parents were to enroll in a "full drug rehab program w/random testing."

Mother tested positive for methamphetamine in June 2017. Social workers then invoked the order to do full drug testing.

The 12-month review was held in early June, 2018.[1] By this time the case had been transferred to Orange County. Mother had only minimally complied with her case plan, and Father hadn't even tried. He was in jail during much of this period, during which he was "incarcerated multiple times." Mother had severely damaged her credibility going into the June 2018, 12-month review by submitting falsified letters of completion of a number of reunification service programs.[2] The court terminated reunification services and set a permanency planning hearing (Welf. & Inst. Code, § 366.26[3]) for September 25, 2018. That hearing, however, was continued to mid-October 2018, because of Mother's counsel's unavailability, then into November, and then again into December. In the interim, on October 16, 2018, Mother filed a petition for modification under section 388.

Mother's section 388 petition was almost entirely based on what she recounted she had "learned" since March 2018 from her various programs. The actual, new, post-12 month review events enumerated in her declaration were: the completion of a PEP program in August 2018, the completion of a Perinatal Drug program in September 2018, the continuation of weekly psychotherapy begun in May 2018, the fact she was now working part time as a fitness instructor, the fact she was in school full time in a nursing program, and the fact she had her own apartment. She averred she had been sober since St. Patrick's Day 2018.

The court scheduled both the section 366.26 hearing and the section 388 hearing for the same time in January 2019. At the combined hearing both Katelyn (now 10) and Charlize (now six and a half) testified. Mother did not. The trial court first denied the section 388 petition, specifically noting that both Katelyn and Charlize had

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1 The case plan was ordered March 14, 2017; the12-month review took place June 5, 2018.

2 These included an outpatient substance abuse program, a counseling program known as PEP (for personal empowerment program), a parenting class known as FACES (for family and coparenting enrichment services), and a domestic violence program.

3 All further statutory references are to the Welfare and Institutions Code.

testified they did not want to live with their mother. Katelyn felt "safe and secure" with her paternal grandparents; Charlize was "unequivocal that she did not want to return to her mother's care and custody."

The court next terminated Mother's parental rights under section 366.26, noting the sisters were "generally adoptable." The judge determined that legal guardianship by her paternal grandparents was best for Katelyn (the grandparents wanted to be guardians as distinct from adoptive parents), while adoption by her current caretakers (her paternal uncle and aunt) was best for Charlize. The court also ordered Katelyn's guardians to facilitate visits between both sisters "as often as possible."

Mother has now appealed from both orders. As to the denial of her section 388 motion, Mother argues the trial court abused its discretion in finding her circumstances were only "changing" rather than actually "changed." As to the section 366.26 order, she invokes the oft-litigated "benefit exception" (§ 366.26, subd. (c)(1)(B)(1)[4]) applicable when a parent has maintained such regular visitation and contact with the child that it would be detrimental to the child to terminate parental rights. Mother contends that substantial evidence does not support the trial court's finding she is not in a parental role vis-à-vis her daughters. Father initially joined in Mother's appeal but later abandoned it.

We must affirm. A section 388 modification requires the party seeking modification to carry the burden, by a preponderance of evidence, of showing two things: (1) genuinely changed circumstances and (2) a *benefit* to the minor's *best interests* from changing the order (e.g., *In re Daijah T.* (2000) 83 Cal.App.4th 666, 672), criteria whose evaluation was within the broad discretion of the hearing judge.

Here, Mother did not carry her burden as to either prong. As to changed circumstances, we note that *most* of her section 388 petition recounted what Mother had

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[4] Formerly section 366.26, subdivision (c)(1)(A).

learned via exposure to various service providers. But there was a paucity of tangible, quantifiable, real-world changes bearing on the childrens' best interests. Arguably the most dramatic of the changes was her declared sobriety since March 2018. Like the trial judge we congratulate Mother on her progress and encourage her to continue on that path. But Mother had continued her erratic pattern of lack of follow through even after the June 5 termination of reunification services: As the trial judge noted, there was no evidence Mother had attended any Alcoholics or Narcotics Anonymous meetings, nor followed up on her Perinatal Drug Program, nor done any testing.

In fact, the trial court could reasonably conclude that Mother had not completely overcome her drug addiction problem, particularly given Mother's impaired credibility: A careful reading of Mother's section 388 petition shows she enrolled in a Perinatal Outpatient program on March 3, 2018, and drug tested twice a week "throughout [her] six months in the program." Six months from early March goes to early September. Yet in this time Mother had four no-shows – of indeterminate date – and two "dilutes," also of indeterminate date. Such a pattern is not sufficient to demonstrate *long-term* sobriety. (See *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531, fn. 9 ["It is the nature of addiction that one must be 'clean' for a much longer period than 120 days to show real reform"].) Long-term sobriety is demonstrated by becoming sober at the beginning of the dependency process, not in the few months between the termination of services and possible termination of parental rights.

The evidence on the second prong of section 388 is tragically sad. Both daughters testified they did *not* want to live with their Mother. Charlize was asked what her favorite thing about Mother was. Charlize said she didn't have one. Katelyn was more charitable. Katelyn said Mother was a "nice, caring mom" but she doesn't always think about Katelyn and her sister's feelings, and did so even less at the time of her testimony than she "used to." When asked why she would rather live with her paternal

grandparents than her mother, Katelyn said she was "doing a lot of good things" and if she went back to her mother she "wouldn't have any of that."

Far from showing a benefit to either child from a change of custody, such evidence shows such an order would have been emotionally traumatic for both of them. (See *In re Joseph B.* (1996) 42 Cal.App.4th 890, 901 [noting potential emotional trauma even in case where parent had achieved objectives of reunification plan].)

For the same sad reason we must conclude the trial court correctly rejected application of the benefit exception. There was no hard evidence that derailing permanency for either Charlize or Katelyn would actually benefit them. Mother's arguments on the benefit exception are confined to emphasizing the abstract benefits of a continued parental relationship. Our record of Mother's progress however, is simply too thin to show any concrete benefit to the children from applying the exception.[5]

The orders of the court are affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.

[5] We cannot quarrel with the court below on these facts. We should also note the trial court has already provided for continued sibling contact, so the sibling bond exception to termination (§ 366.26, subd. (c)(l)(B)(v)) would not apply either.